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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

REBEKAH L. HART, individually,

Appellant,

v.

EMILY PRATHER and "JOHN DOE" PRATHER, individually and the marital community comprised thereof; PARKER J. KNAUER, individually; STEVEN KNAUER and PAMELA KNAUER, individually and the marital community comprised thereof; BRAYDEN STANTON and "JANE DOE" STANTON, individually and the marital community comprised thereof; TODD EVANS and "JANE DOE" EVANS, individually and the marital community comprised thereof; ERIC NELSON and "JANE DOE" NELSON, individually and the marital community comprised thereof; DAVID W. BARKER and "JANE DOE" BARKER, individually and the marital community comprised thereof,

Respondents.

RESPONDENTS PRATHER AND KNAUER'S RESPONSE BRIEF

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I. INTRODUCTION

This case involves a six-week trial where the evidence, jury instructions, and verdict form allowed the jury to decide fault and apportion damages regarding four successive auto accidents. Emily Prather and Parker Knauer were involved in the first accident where Prather was driving the Knauer family car.¹

The case involved issues of fault including whether Prather was at fault for the first accident,² and involved the issue of whether Plaintiff's claimed injuries and damages were indivisible.³ Under Washington law, in matters involving successive tortfeasors and multiple accidents, liability among at fault defendants is joint and several only if the harm to the Plaintiff is indivisible.⁴

The Court gave jury instructions that were consistent with Washington law regarding successive tortfeasors and regarding whether the Plaintiff's damages were indivisible. The court gave Instruction 2 which stated "Plaintiff also claims that her injuries and/or damages are indivisible. The defendants deny that claim." The court gave Instruction 12 which stated that if the jury found that Plaintiff's injuries were caused by a combination of the four accidents, "the burden of proving how damages should be divided or

¹ RP 635-636.

² CP 2528.

³ CP 2528.

⁴ See *Phennah v. Whalen*, 28 Wn.App. 19, 29, 621 P.2d 1304 (1980); *Cox v. Spangler*, 141 Wn.2d 431, 42-443.

allocated, if at all, is upon those defendants found to be negligent⁵” The Court gave Instruction 25 which clarified how the jury was to consider the March 22, 2014 collision, involving dismissed defendant Brittney Powell, stating “You are to consider the accident of March 22, 2014 solely for the purpose of deciding, what if any, effect that accident had on plaintiff’s claimed injuries or damages.⁶”

In its verdict form, the court gave a very plaintiff-favorable Question 11 that asked “Given the timeline of the collisions set forth above, were some of the plaintiff’s economic and noneconomic injuries indivisible injuries.⁷” That verdict form question was set up so that if the jury answered yes – finding that some injuries were indivisible injuries, the jury would sign the special verdict form without apportioning damages between the accidents such that joint and several liability would result.

However, the jury answered “no” to the question, “Given the timeline of the collisions set forth above, were some of the plaintiff’s economic and noneconomic injuries indivisible injuries.⁸” After the jury thus specifically found that none of the Plaintiff’s injuries were indivisible, the verdict form allowed the jury to apportion damages between the accidents, and the trial judge accordingly entered judgment for Plaintiff against Prather and Knauer for their share of Plaintiff’s damages.⁹

⁵ CP 2538.

⁶ CP 2551.

⁷ CP 2500.

⁸ CP 2562.

⁹ CP 2731-2733.

Those instructions, the verdict form, and Plaintiff's judgment against Prather and Knauer were in harmony with Washington law that successive tortfeasors are jointly and severally liable only when there has been indivisible injury. Likewise, Plaintiff's verdict against Prather and Knauer was in harmony with the jury's determination that none of Plaintiff's injuries and damages were indivisible and with the jury's apportionment of injuries and damages between the four accidents. Given that harmony with Washington law, this Court should affirm the Plaintiff's judgment as to Prather and Knauer.

The Plaintiff raises other issues but none of them would justify setting aside Plaintiff's judgment as to Prather and Knauer.

The Plaintiff argues that there should be a new trial because there was not substantial evidence for the jury to allocate 20% of the Plaintiff's injuries and damages to the March 22, 2014 accident. But overturning a jury verdict is appropriate only when the verdict is clearly unsupported by substantial evidence, and a challenge to a verdict admits the truth of the opponent's evidence and all inferences that can be reasonably drawn from it.¹⁰ Here, there was substantial evidence that Plaintiff was injured in the accident of March 22, 2014 such that the jury could and did reasonably apportion a percentage of the Plaintiff's damages to that accident.

The Plaintiff argues that a new trial is warranted because the court gave two jury instructions on superseding cause. But jury instructions are

¹⁰ *McCoy v. Kent Nursery, Inc.*, 163 Wn.App. 744, 769, 260 P.3d 967 (2011).

sufficient when they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied.¹¹ Here, in the context of a case that involved four successive accidents with a dispute regarding whether harm from those accidents was indivisible, and which involved a sharp liability dispute between co-defendants Nelson and Stanton as to the second accident, as well as a hotly contested liability dispute as to the Prather/Knauer accident, the court gave two instructions on superseding cause with one being specific to Nelson and Stanton. There is no basis to set aside the jury's verdict and the judgment as to Prather and Knauer because (1) the liability dispute between Nelson and Stanton had no impact on the damages Plaintiff was awarded from Prather and Knauer; because (2) the superseding cause instruction did not misstate the law in a context where there were four successive accidents and a dispute regarding whether the harm from those accidents was indivisible; and because (3) Plaintiff has not shown that those superseding cause instructions prevented her from arguing her case or otherwise prejudiced her.

The Plaintiff next argues that judgment notwithstanding the verdict should have been taken against Nelson as to fault for the December 22, 2009 accident or that she should have a new trial as to Nelson. But as long as one of those parties was at fault for the December 22, 2009 accident, whether the

¹¹ *Anfinson v. Fed Ex Ground Package Sys., Inc.*, 159 Wn.App. 35, 4, 244 P.3d 32 (2010).

other was also at fault would have no impact on the amount of damages that Plaintiff could be awarded from Prather and Knauer as to the March 1, 2009 accident. Given the lack of impact as to Prather and Knauer, this Court should affirm the Plaintiff's judgment as to Prather and Knauer regardless of whether or not it reverses to direct entry of judgment as a matter of law against Nelson or grants Plaintiff a new trial as to Nelson.

The Plaintiff further argues that she is entitled to a new trial because the court did not give an instruction on loss of earning capacity. But it is proper for a judge to decline to give a proposed jury instruction when that instruction is not supported by substantial evidence.¹² Here, in her discovery responses, Plaintiff never set forth any evidence of wage loss or loss of earning incapacity,¹³ at trial Plaintiff never provided any evidence of wage loss or loss of earning capacity, and Plaintiff presented no expert testimony regarding loss of earning capacity.¹⁴ Rather, Plaintiff continued rigorous schooling requiring long bus rides and/or car rides, and continued employment throughout the claimed period. This Court should deny Plaintiff's request for a new trial and affirm the Plaintiff's judgment as to Prather and Knauer as the trial judge properly declined to give a loss of earning capacity instruction when Plaintiff did not present substantial evidence of a loss of earning capacity.

¹² *Minert v. Harsco Corp.* 26 Wn.App. 867, 873, 614 P.2d 686 (1990).

¹³ RP 4509-4511.

¹⁴ See e.g. RP 4509-4511.

Finally, the Plaintiff argues that she is entitled to a new trial based on allegations of jury misconduct. But to set aside a jury verdict, the appellant must make a strong affirmative showing of misconduct in order to overcome the policy favoring stable verdicts and the secret and frank discussion of evidence by the jury.¹⁵ In addition, declarations from jurors regarding the way a jury reached its verdict cannot be used to set aside a verdict because the individual or collective thought processes leading to a verdict inhere in the verdict.¹⁶ Here, Plaintiff's request for a new trial is based on inadmissible juror declarations regarding the way the jury allegedly reached its verdict, and those declarations made no strong affirmative showing of jury misconduct, and no showing of prejudice to Plaintiff. Plaintiff was awarded over \$300,000.¹⁷ Plaintiff has not approached the showing needed for this Court to grant a new trial based on juror misconduct. This Court should decline to do so, and should instead affirm the verdict as to Prather and Knauer.

II. COUNTERSTATEMENT OF THE ISSUES

Respondents Prather and Knauer acknowledge the issues advanced in the Brief of Appellant but assert that issues related to Prather and Knauer are more appropriately formulated as follows:

¹⁵*Breckinridge v. Valley Gen Hosp.*, 150 Wn.2d 197, 203, 75 P.3d 944 (2003); *McCoy*, 163 Wn.App. at 760.

¹⁶ *McCoy*, 163 Wn.App. at 765-766.

¹⁷ CP 2559-2562.

- A. In matters involving successive tortfeasors and multiple accidents, liability among at fault defendants is joint and several only if the harm to the Plaintiff is indivisible. Here, the jury specially found that none of the Plaintiff's injuries were indivisible and apportioned damages between the accidents, and the Judge accordingly entered judgment for Plaintiff against Prather and Knauer for their share of Plaintiff's damages. Should this Court affirm that judgment as several liability was appropriate when Plaintiff's harm was not indivisible?
- B. Jury verdict forms, like jury instructions, are sufficient when they allow the parties to argue their theories of the case, do not mislead the jury and, when, taken as a whole, properly inform the jury of the law to be applied. Here, the verdict form, in combination with the instructions, did not misstate the law or mislead the jury as it was consistent with the law applicable to successive tortfeasors. The verdict form and instructions allowed Plaintiff to argue her case theory that her injuries were indivisible, allowed the jury to segregate damages between the accidents, and thus allowed the judge to determine whether liability would be several or joint and several and enter judgment accordingly. Should this Court affirm the Plaintiff's judgment as to Prather and Knauer as the verdict form was sufficient?
- C. Overturning a jury verdict is appropriate only when the verdict is clearly unsupported by substantial evidence, and a challenge to

the verdict admits the truth of the opponent's evidence and all inferences that can be reasonably drawn from it. Here, there was substantial evidence that Plaintiff was injured in the accident of March 22, 2014 such that the jury could and did reasonably apportion a percentage of the Plaintiff's damages to that accident. Should this Court affirm the Plaintiff's judgment as to Prather and Knauer as there was substantial evidence supporting the jury's attribution of a percentage of damages to the March 22, 2014 accident?

- D. Jury instructions, are sufficient when they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied. Here, in the context of a case that involved four successive accidents with a dispute regarding whether harm from those accidents was indivisible and involved a sharp liability dispute between co-defendants Nelson and Stanton as to the second accident, as well as a hotly contested liability dispute as to the Prather/Knauer accident, the court gave two instructions on superseding cause with one being specific to Nelson and Stanton. Should this Court affirm the Plaintiff's judgment as to Prather and Knauer where (1) the liability dispute between Nelson and Stanton had no impact on the damages Plaintiff was awarded against Prather and Knauer; where (2) the superseding cause instruction did not misstate the law in a context where there were

four successive accidents and a dispute regarding whether the harm from those accidents was indivisible; and where (3) Plaintiff has not shown that those superseding cause instructions prevented her from arguing her case or otherwise prejudiced her?

- E. Whether both Stanton and Nelson were at fault for the December 22, 2009 accident or whether only Stanton was at fault for that accident would have no impact on the damages that Plaintiff recovered against Prather and Knauer. Given that lack of impact as to Prather and Knauer, should this Court affirm the Plaintiff's judgment as to Prather and Knauer regardless of whether or not it reverses to direct entry of judgment as a matter of law against Nelson or grants Plaintiff a new trial as to Nelson?
- F. It is proper for a judge to decline to give a proposed jury instruction when that instruction is not supported by substantial evidence. Here, in her discovery responses, Plaintiff never set forth any evidence of wage loss or loss of earning capacity; at trial Plaintiff never provided any evidence of wage loss or loss of earning capacity; and Plaintiff presented no expert testimony regarding loss of earning capacity. Instead, Plaintiff continued rigorous schooling and employment. Should this Court deny Plaintiff's request for a new trial and affirm the Plaintiff's judgment as to Prather and Knauer when the trial judge properly declined to give a loss of earning capacity instruction given that

Plaintiff did not present substantial evidence of a loss of earning capacity?

G. To set aside a jury verdict, the appellant must make a strong affirmative showing of juror misconduct in order to overcome the policy favoring stable verdicts and the secret and frank discussion of evidence by the jury; and declarations from jurors regarding the way a jury reached its verdict cannot be used to set aside a verdict because the individual or collective thought processes leading to a verdict inhere in the verdict. Should this Court deny Plaintiff's request for a new trial and affirm the Plaintiff's judgment as to Prather and Knauer when Plaintiff's motion for new trial was based on inadmissible juror declarations, Plaintiff made no showing of juror misconduct, and Plaintiff made no showing of prejudice?

III. COUNTERSTATEMENT OF THE CASE

A. Accidents

This case arises out of four discrete automobile collisions that occurred over a number of years, all of which involved Plaintiff Rebecca Hart ("Hart"). Ms. Hart was involved in separate collisions, which occurred on the following dates: March 1, 2009; December 22, 2009; April 7, 2013; and March 22, 2014. On March 1, 2009, Emily Prather was driving her then high school boyfriend's, Parker Knauer ("Knauer"), family car, a 2001 Dodge Durango, on the Olympic Drive overpass on Highway 16 in Gig

Harbor.¹⁸ Mr. Knauer was the front seat passenger. Ms. Prather maneuvered into the left-hand turn lane¹⁹ and, upon receiving a left turn arrow, she made her left turn.²⁰ While making her turn, the vehicle collided with Ms. Hart's Nissan.²¹

On December 22, 2009, nine months later, Ms. Hart was involved in a second collision.²² While riding as a passenger in Brayden Stanton's step-father's Nissan Titan, Ms. Hart participated in some off-roading and four-wheeling.²³ While engaging in some negligent activity, which Plaintiff alleged involved Eric Nelson ("Nelson"), Mr. Stanton lost control of the vehicle, and he, along with Ms. Hart, traveled off of the road and into the trees and brush.²⁴

On April 7, 2013, Ms. Hart again was traveling near the Olympic Drive overpass on Highway 16 in Gig Harbor when David Barker ("Barker") failed to yield the right-of-way while turning and collided with Ms. Hart's vehicle.²⁵

Finally, on March 22, 2014, Ms. Hart was involved in a fourth and final collision. Ms. Hart was riding as a passenger in her friend Brittany Powell's vehicle.²⁶ While trying to merge onto I-5, Ms. Powell claimed that

¹⁸ RP 635-636.

¹⁹ RP 637.

²⁰ RP 676.

²¹ RP 637.

²² RP 648.

²³ RP 648.

²⁴ RP 651.

²⁵ RP 655.

²⁶ RP 661.

her tire blew, which caused her vehicle to spin and collide with another vehicle. In the process, Ms. Powell had crossed four lanes of traffic and was hit at highway speed by an oncoming vehicle on the front passenger side of the vehicle, which is where Ms. Hart was located.²⁷

B. Experts

Ms. Prather and Mr. Knauer retained experts in this matter to consider the extent of Ms. Hart's claimed injuries after each particular collision and to identify whether Ms. Hart's alleged symptoms resolved prior to the collision of December 22, 2009.²⁸ Harold Lee Rappaport, an experienced neurologist and psychiatrist²⁹ was initially retained by Ms. Prather and Mr. Knauer to perform a CR 35 examination and corresponding record's review of Ms. Hart.³⁰ Dr. Rappaport was further retained by other defendants in this matter relating to the remaining collisions.³¹

Pursuant to Ms. Hart's medical files, Dr. Rappaport concluded that Ms. Hart had made "some good, steady improvement over time from the first accident, at least through December 10th, 2009."³² To the jury, Dr. Rappaport recognized that, although Ms. Hart had reported to him that she had hit her head in the collision, her emergency room record following the first accident

²⁷ RP 696.

²⁸ See RP 2564, 2775.

²⁹ RP 2775.

³⁰ RP 2782.

³¹ RP 2785.

³² RP 2789.

reflected that she had not hit her head in the collision.³³ Further, her emergency room record, which was taken thirteen hours post-collision, described Ms. Hart as having full range of motion in her neck and that her neck was supple.³⁴ Dr. Rappaport opined this fact was significant because thirteen hours post-collision, a patient should be starting to experience the pain they would be experiencing with the accident.³⁵

Dr. Rappaport diagnosed Ms. Hart as suffering from a cervical dorsal sprain and strain and secondary headaches as a result of the March 1, 2009 accident.³⁶ He further opined that Ms. Hart had not suffered any disability or impairment related to the March 1, 2009 accident.³⁷ The treatment Dr. Rappaport concluded was reasonable based on the first accident on a more likely than not basis included: 1) twice-a-week physical therapy for up to three months; 2) twice-a-week chiropractic treatment for up to three months; and 3) massage therapy twice-a-week for up to three months.³⁸ He concluded that a total of twenty four appointments of each treatment was reasonable under the claim.³⁹ Additionally, Dr. Rappaport opined that the x-rays, ultrasound, and MRI scans Ms. Hart had performed were reasonable, as well as the treatment she received from Dr. Finkleman.⁴⁰ Finally, Dr. Rappaport considered the trial of medications Ms. Hart was prescribed to be

³³ RP 2790-2791.

³⁴ RP 2791.

³⁵ RP 2791.

³⁶ RP 2803.

³⁷ RP 2804.

³⁸ RP 2804.

³⁹ RP 2804.

⁴⁰ RP 2805.

reasonable.⁴¹ However, he opined that further treatment for the first accident after three months was wholly unreasonable.⁴² Based on Dr. Rappaport's opinions regarding length of treatment, a total of \$12,687.01 in medical specials was deemed reasonable and necessary as a result of the first accident.⁴³ Upon examination, Dr. Rappaport further concluded that Ms. Hart's subjective complaints did not match the objective findings,⁴⁴ and that she engaged in symptom magnification.⁴⁵

In regards to Ms. Hart's complaints of headaches, Dr. Rappaport identified the following as potential diagnoses for Ms. Hart's headaches as suggested by her own providers: cervicogenic headaches, tension headaches, muscle strain related headaches, sleep hygiene related headaches, rebound headaches from medication overuse, and facet joint mediated headaches.⁴⁶

Dr. Rappaport diagnosed Ms. Hart with the following injuries as a result of the December 22, 2009 accident: cervicodorsal and lumbosacral sprain/strain, with secondary headaches.⁴⁷ Dr. Rappaport opined that the "cervicodorsal strain and secondary headaches were present from the first accident but had largely resolved by the time of the second accident."⁴⁸

⁴¹ RP 2805.

⁴² RP 2805.

⁴³ RP 2806-2807.

⁴⁴ RP 2827.

⁴⁵ RP 2830.

⁴⁶ RP 2832.

⁴⁷ RP 2833.

⁴⁸ RP 2833.

Ms. Prather and Mr. Knauer also retained Dean Shibata, MD, a neuroradiologist, who reviewed and analyzed Ms. Hart's treatment images.⁴⁹ Based on the imaging, he opined that none of the imaging showed any injury from either the first or second collision and that on a more likely than not basis, he saw no findings that would be related to any trauma.⁵⁰ He concluded that he did not see anything in the imaging that would require further treatment or imaging.⁵¹

C. Earning Capacity

Despite her alleged injuries, Ms. Hart has successfully participated in higher education, obtaining her two-year degree in culinary arts.⁵² Throughout her schooling, she continued to work, even commuting from Gig Harbor to Seattle by bus to attend both her schooling program and work.⁵³ Even with such a grueling schedule, she maintained high grades in her programs, her husband even testifying that as far as he knew, she was earning "A's."⁵⁴ She is currently attending Pacific Lutheran University to obtain a degree in epidemiology.⁵⁵

⁴⁹ RP 2577.

⁵⁰ RP 2606.

⁵¹ RP 2610.

⁵² RP 1471.

⁵³ RP 3344.

⁵⁴ RP 1489.

⁵⁵ RP 1472; 3576.

D. Verdict Form

On February 20, 2018, amid jury deliberations, the trial court received juror question 4, requesting clarification of Question 10 on the Special Verdict Form and Jury Instruction 12, as “they mention 4 accidents but Brittney Powell is found not negligent.”⁵⁶ Due to the confusion in how to deal with injuries considered to have been caused by the March 22, 2014 accident, the trial court issued a Revised Special Verdict Form to include the March 22, 2014 accident.⁵⁷ It was the trial court’s intent to “put the collision of March 22nd, 2014, back in the allocation of divisible responsibility.”⁵⁸ This inclusion was to allow the jurors to adequately divide the damages, including damages deemed to have been caused by the March 22, 2014 incident regardless of whether anyone was at fault.⁵⁹ The Attorney for Ms. Hart, Mr. Lindenmuth, recommended adding language to the trial court’s revised proposed language for question 10, and the trial court included the proposed language.⁶⁰

Although Ms. Hart’s counsel originally took exception to the revised verdict form⁶¹, following the finalization of the revised special verdict form,

⁵⁶ CP 2512-2514

⁵⁷ RP February 20, 2018, Pg. 12.

⁵⁸ *Id.*

⁵⁹ *Id.* at 13.

⁶⁰ *Id.* at 15.

⁶¹ *Id.* at 18.

Ms. Hart's counsel expressed satisfaction with the form, stating "I note from the Plaintiff's position the Court has now helped in providing needed clarity."⁶²

IV. ARGUMENT

A. The Judgment as to Prather and Knauer should be affirmed as the Court was correct in entering judgment against Prather and Knauer severally when the jury answered "no" to the question, "Given the timeline of the collisions set forth above, were some of the plaintiff's economic and noneconomic injuries indivisible injuries."

The trial court was correct in entering judgment against Prather and Knauer severally when the jury determined that Plaintiff's economic and noneconomic injuries were divisible based on successive tortfeasor liability. Plaintiff's argument lacks merit because it conflates the law applicable regarding when joint and several liability applies when there are multiple tortfeasors as to a single accident with the law applicable to when there is joint and several liability among successive tortfeasors who have caused multiple accidents. This matter deals with successive tortfeasor liability, as Plaintiff correctly relayed in her trial brief, stating "It is plaintiff's firm position that in this multiple defendant case that the defendants fall within the category of 'successive' tortfeasors."⁶³ Plaintiff's trial brief stated that "'successive' tortfeasor liability typically is implicated when the alleged negligent acts of each individual defendant are unrelated in time and are

⁶² *Id.* at 23.

⁶³ CP 1125.

otherwise independent acts of negligence.”⁶⁴ As each of the collisions involved occurred at different moments in time and different locations, successive tortfeasor liability is what is at issue in this case.

In successive tortfeasor cases, joint and several liability applies only “if the jury finds that the harm is indivisible.”⁶⁵ Where there is no such finding of an indivisible injury, joint and several liability shall not apply to successive tortfeasors. In fact, the Washington Supreme Court recognized that joint and several liability applies only, “so long as each tort-feasor’s conduct is found to have been a proximate cause of the indivisible harm.”⁶⁶

The burden is placed on the defendants to prove allocation of damages amongst themselves once the plaintiff has proven that each successive tortfeasor caused some damage.⁶⁷ In this matter, the jury was clearly instructed on the defendants’ burden when Jury Instruction 12 relayed that “the burden of proving how damages should be divided or allocated, if at all, is upon those defendants found to be negligent.”⁶⁸ And with this instruction, the jury still answered “no” to the question, “Given the timeline of the collisions set forth above, were some of the plaintiff’s economic and noneconomic injuries indivisible injuries?”

⁶⁴ CP 1125 (citing *Phennah v. Whalen*, 28 Wn.App. 19, 24, 621 P.2d 1304 (1980).

⁶⁵ *Phennah*, 28 Wn.App. at 29.

⁶⁶ *Seattle First National Bank v. Shoreline Concrete*, 91 Wn.2d 230, 236, 588 P.2d 1308 (1978) (emphasis added).

⁶⁷ *Phennah*, 28 Wn.App. at 29.

⁶⁸ CP 2538.

Strong evidence was put on by Prather and Knauer, supporting their position that their responsibility for injuries and damages did not extend past the December 22, 2009 date of the second accident. Defense expert Dr. Rappaport effectively testified that none of plaintiff's damages after December 22, 2009 were related to the March 1, 2009 accident, going so far as to say that he "did not feel the further treatment for the first accident after three months as reasonable under the claim"⁶⁹ and that the plaintiff's symptoms had "largely resolved by the time of the second accident."⁷⁰ The jury was further provided testimony from Plaintiff's now husband, Chris Patton, where he stated that he was not made aware of the Prather/Knauer accident, even though they were dating prior to the December 22, 2009 accident.⁷¹ Based on Patton's testimony, Plaintiff did not inform him that she had any issues, injuries, or complaints between October 2009, when they started dating, and December 22, 2009, the date of the second accident.⁷²

Finally, Plaintiff's own treating physician, Dr. Finkleman, had written a four-page report, wherein he was asked to apportion damages between accident number one and accident number two.⁷³ In this report, which was his opinion for four years following the collisions one and two, Dr. Finkleman opined that treatment after the first accident and treatment prior to the second accident was 100% related to the first accident, while the "[s]ubsequent

⁶⁹ RP 2805.

⁷⁰ RP 2833.

⁷¹ RP 1480.

⁷² RP 1480.

⁷³ RP 4318.

treatment after the second motor vehicle accident was, in my opinion, one hundred percent related to the second motor vehicle accident.”⁷⁴ Because the jury determined that the injuries were divisible based on the evidence put forth in the trial, joint and several liability is inapplicable here, and the verdict as to Parker/Knauer should be affirmed.

B. The Judgment as to Prather and Knauer should be affirmed because the verdict form used in combination with the jury instructions allowed all parties to argue their theories of the case, was not misleading, did not misstate the law, and allowed the jury to set out its determinations regarding fault, regarding whether any of Plaintiff’s injuries were indivisible injuries, and regarding the damages for each of the accidents.

Verdict forms are reviewed under the same standard used for jury instructions. As such, they are not deemed erroneous “if they permit each party to argue their theory of the case, are not misleading, and when read as a whole, properly inform the trier of fact of the applicable law.”⁷⁵ In *Canfield*, the court determined that no error was found in the verdict form when it failed to prevent the appealing party from arguing its theory of the case.⁷⁶ The appealing party was able to argue to the jury, both in closing and rebuttal, that if the relevant statements amounted to defamation per se, then damages could be presumed as long as they were the proximate result of the statements made.⁷⁷

⁷⁴ RP 4318-4319.

⁷⁵ *Canfield v. Clark*, 196 Wn.App. 191, 199, 385 P.3d 156 (2016).

⁷⁶ *Id.* at 201.

⁷⁷ *Id.*

In this case, the verdict form was similarly sufficient. Plaintiff was able to, and did, make her liability arguments about each corresponding accident, as well as her argument that her injuries were not divisible.⁷⁸ For example, in Plaintiff's rebuttal argument, Plaintiff's counsel referenced Question 11 on the verdict form, emphasizing the importance of the jury's answer to the question "'Given the timeline of the collisions set forth above, were some of the plaintiff's economic and noneconomic injuries indivisible injuries?'"⁷⁹ Plaintiff's counsel relayed to the jury his view that the obvious answer to this question would be "Absolutely yes."⁸⁰ In fact, the Special Verdict Form, and this question especially, provided Plaintiff a considerable benefit, in that it would have imposed joint and several liability to apply to all involved collisions, even if only some, not all, of the injuries were deemed to be indivisible. Plaintiff cannot now claim to have been treated unfairly by such a question because the jury determined there were no indivisible injuries.

Consistent with Plaintiff's theory of the case, Questions 1-5 of the verdict form allowed the jury to make the required determinations as to whether the defendants were at fault and were the proximate cause of the injuries and or damages to the Plaintiff.⁸¹ Questions 7-10 allowed the jury to adequately segregate damages between the accidents. Question 11, a

⁷⁸ RP 4376-4377; 4261; and 4276.

⁷⁹ RP 4376.

⁸⁰ RP 4376.

⁸¹ CP 2559-2562.

Plaintiff-favorable question, allowed the jury to determine whether any injuries were indivisible and, thus, allowed the trial judge to determine whether liability for negligent defendants would be several for the successive tortfeasors or joint and several. Finally, question 12 in combination with the 11 prior questions, allowed the trial judge to enter several judgments for damages pursuant to the jury's findings that none of the injuries were indivisible. By using the language in Question 12 regarding "What percentage of the 100% is attributable to the negligence or collision," the verdict form allowed the jury to properly apportion damages between each of the collisions. When read as a whole, and with the inclusion of the jury instructions, the verdict form effectively informed the jury of the applicable law, or as stated by Plaintiff's counsel, "helped in providing needed clarity."⁸²

In correspondence with the jury instructions provided, the verdict form adequately informed the jury of the applicable law. The trial court gave jury instructions that were consistent with Washington law regarding successive tortfeasors, regarding whether the Plaintiff's damages were indivisible, and regarding burden of proof for apportionment. In fact, the instructions regarding joint and several liability among successive tortfeasors are consistent with those in *Cox v. Spangler*.⁸³

⁸² RP February 20, 2018, Pg. 23.

⁸³ 141 Wn.2d at 44, 5 P.3d 1265 (2000).

In this matter, the jury was clearly instructed on the defendants' burden when Jury Instruction 12 relayed that "the burden of proving how damages should be divided or allocated, if at all, is upon those defendants found to be negligent."⁸⁴ Additionally, the court gave Instruction 25, which clarified how the jury was to consider the March 22, 2014 collision, involving dismissed defendant Brittney Powell. The instruction stated "You are to consider the accident of March 22, 2014 solely for the purpose of deciding, what if any, effect that accident had on plaintiff's claimed injuries or damages."⁸⁵

Further, although Plaintiff's attorney did initially take exception to the revised verdict form,⁸⁶ his comments made after the exception, offering praise⁸⁷, serve as a waiver to the prior objection. Once an objection to an instruction is withdrawn, the party is not able to later assert error based off its use.⁸⁸ Following the finalization of the revised special verdict form, Plaintiff's attorney expressed satisfaction with the form, stating "I note from the Plaintiff's position the Court has now helped in providing needed clarity."⁸⁹ This statement serves as a waiver of Plaintiff's prior objection.

The referenced instructions, the verdict form, and Plaintiff's judgment as to Prather and Knauer were in harmony with Washington law that

⁸⁴ CP 2538.

⁸⁵ CP 2551.

⁸⁶ RP February 20, 2018, Pg. 20.

⁸⁷ *Id.* at 23.

⁸⁸ *State v. Kerr*, 14 Wn.App. 584, 591, 544 P.2d 38 (1975).

⁸⁹ *Id.* at 23.

successive tortfeasors are only jointly and severally liable when there has been indivisible injury.

C. The Judgment as to Prather and Knauer should be affirmed because there was sufficient evidence to support the jury's determination that 20% of Plaintiff's damages were attributable to the collision of March 22, 2014.

A court may not “overturn the jury’s verdict unless it is clearly unsupported by substantial evidence, i.e., evidence that, if believed, would support the verdict.”⁹⁰ Substantial evidence is considered to be evidence “sufficient to persuade a fair-minded person that the premise is true.”⁹¹ It is the role of the jury to consider credibility of witnesses and the persuasiveness of the evidence presented.⁹² It is not the court’s role to substitute its judgment for that of the jury, especially, when as here, sufficient evidence was presented to support the jury’s determination.⁹³

Based on the jury’s apportioning of 20% damages to the March 22, 2014 accident, it is clear that the jury attributed some of the Plaintiff’s injuries to the fourth accident, regardless of Powell’s fault, due to the severity of the incident and Plaintiff’s heightened symptoms. The evidence before the jury included the allegation that on March 22, 2014, the tire on Powell’s vehicle blew, which caused her vehicle to lose control, spin, and collide with

⁹⁰ *Maytown Sand & Gravel, LLC v. Thurston County*, 198 Wn.App. 560, 395 P.3d 149 (2017), *rev’d on other grounds*, 191 Wn.2d 392, 423 P.3d 223 (2018).

⁹¹ *Id.* at 577.

⁹² *Id.* at 585; *McCoy v. Kent Nursery, Inc.*, 163 Wn.App. 744, 771,

⁹³ *See id.*

another vehicle.⁹⁴ Overall, this process caused Powell's vehicle to cross four lanes of freeway traffic and, ultimately, collide with another vehicle at highway speed by an oncoming vehicle on the front passenger side of the vehicle, which is where Ms. Hart was located.⁹⁵

Plaintiff's own expert, Dr. Murinova, provided testimony which supported that Plaintiff suffered injury as a result of the March 22, 2014 collision.⁹⁶ In fact, Dr. Murinova testified that the additional trauma caused to Plaintiff as a result of the fourth accident was worsening headaches.⁹⁷ She based this opinion per report of the Plaintiff, who was suffering from "two to three headaches to all day headaches" as a result of the fourth collision.⁹⁸ In the testimony provided by Dr. Attaman, the doctor that treated Plaintiff most recently after the March 22, 2014 collision, Dr. Attaman testified that Plaintiff was reporting pain complaints on March 27, 2014, at a 6 ½ to a 7 out of 10, averaging 8 out of 10.⁹⁹

Based on the severity of the accident and the testimony heard by the jury regarding impact of the March 22, 2014 accident, there was substantial evidence to support the 20% apportionment of damage to the fourth collision.

⁹⁴ RP 3341.

⁹⁵ RP 696.

⁹⁶ RP 3212.

⁹⁷ RP 3212.

⁹⁸ RP 3212; 3214.

⁹⁹ RP 3717 - February 17, 2016 - Attaman Perpetuation Deposition, Pg. 63. CP RP 3717 documents that the Attaman deposition was played for the jury. Respondents Prather and Knauer are supplementing their designation of clerk's papers to include the deposition transcript.

Even if for some reason this Court finds that the apportionment of 20% to the March 22, 2014 accident was done in error, which is counter to the evidence provided at trial, the Court would still be able to preserve the verdict by reintroducing the 20% apportionment back in and redistributing that 20% proportionally amongst the defendants found at fault. This would create the following apportionments: 5% to the March 1, 2009 collision, 87.5% to Defendant Stanton, and 7.5% to Defendant Barker.¹⁰⁰ As to Prather and Knauer that would increase the judgment amount from \$33,159 to \$37,319.¹⁰¹

D. The Judgment as to Prather and Knauer should be affirmed because instruction 24 is irrelevant to the claims against Prather and Knauer and because there was no error in giving instruction 23.

Instruction 24 is not relevant to Prather and Knauer because it deals solely with Nelson and whether he would be considered a proximate cause of the December 22, 2009 collision. Thus, it is inapplicable to Prather and Knauer. Accordingly, Instruction 24 will not be further addressed because it

¹⁰⁰ CP 2562.

¹⁰¹The present judgment as to Prather & Knauer was derived as follows: \$17,000 for damages between March 1, 2009 to December 22, 2009 + .04 x \$416,000 in damages after December 22, 2009 = \$33,640 less statutory attorneys' fees to defendant of \$481 = \$33,159. A revised judgment reintroducing the 20% allocated to the March 22, 2014 accident would result in the following judgment amount as to Prather & Knauer: \$17,000 for damages between March 1, 2009 to December 22, 2009 + .05 x \$416,000 in damages after December 22, 2009 = \$37,800 – less statutory attorneys fees to defendant of \$481 = \$37,319

could provide no basis for overturning the judgment as to Prather and Knauer.

Instruction 23 was properly given by the court as this matter deals with successive tortfeasors. Jury instructions are not erroneous if they "(1) permit each party to argue [the] theory of the case, (2) are not misleading, and (3) when read as a whole, properly inform the trier of fact of the applicable law."¹⁰² An intervening act is found to be superseding if it could not reasonably be foreseen by the defendant.¹⁰³ Instruction 23 was proper as it limited a finding of superseding cause to instances where the sole proximate cause of the injury was a later cause and permitted the jury to determine if further accidents were reasonably foreseeable.

Instruction 23 was applicable in this matter because it allowed the defendants to argue their theory of the case that the damages that resulted from the March 22, 2014 accident were not attributable to the prior accidents.

Plaintiff, incorrectly, cites to the unpublished opinion *Lennox v. Lourdes Health Network*, in an attempt to argue that a subsequent accident cannot be an intervening superseding event.¹⁰⁴ This argument lacks merit and this case is inapplicable to the issue at hand. First, Plaintiff rests her argument on the incorrect assertion that the injuries in this case were indivisible. This assertion is false. Here, the jury did not find that the plaintiff's injuries were

¹⁰² *Cramer v. Dep't of Highways*, 73 Wn. App. 516, 520, 870 P.2d 999 (1994) (internal citations omitted).

¹⁰³ *Id.*

¹⁰⁴ No. 33201-2-III, 2016 Wash. App. LEXIS 1613 (Wash. Ct. App. July 12, 2016).

indivisible. Rather, the jury answered “no” to the question, “Given the timeline of the collisions set forth above, were some of the plaintiff’s economic and noneconomic injuries indivisible injuries,” and thus found there were no indivisible injuries.¹⁰⁵ Second, the *Lennox* matter does not even concern whether to give a superseding cause instruction and so offers no insight into the issue at hand. Third, *Lennox* pertains to allegations of concurrent negligence for one injury, not allegations regarding successive accidents. Here, unlike in *Lennox*, the intervening acts of later accidents operated independently of any negligence attributed to earlier accidents.

Because this matter involved successive tortfeasors and divisible injuries, Instruction 23 was properly included to support the defendants’ argument that any damages attributed to the March 22, 2014 accident should not be attributed to the remaining defendants.

Further, there is no indication that Plaintiff was prejudiced by the giving of Instruction 23 because, as discussed above, Plaintiff was able to argue her case that each defendant was at fault and that her injuries were not divisible.

E. The Judgment as to Prather and Knauer should be affirmed because Nelson’s negligence or lack thereof is not material to the claims against Prather and Knauer

The Plaintiff argues that judgment notwithstanding the verdict should have been taken against Nelson as to fault for the December 22, 2009

¹⁰⁵ CP 2562.

accident or that she should have a new trial as to Nelson. But so long as one of those parties was at fault for the December 22, 2009 accident, whether the other was also at fault would have no impact on the amount of damages that Plaintiff could be awarded from Prather and Knauer. This is true because even if Nelson was also at fault for the December 22, 2009 accident, that would not change the allocation of total damages to that accident, and whether Nelson shared fault for the damages allocated to the December 22, 2009 accident would not change the allocation of damages to the other accidents. Given that lack of impact as to Prather and Knauer, this Court should affirm the Plaintiff's judgment as to Prather and Knauer regardless of whether or not it reverses to direct entry of judgment as a matter of law against Nelson or grants Plaintiff a new trial as to Nelson.

F. The Judgment as to Prather and Knauer should be affirmed because the trial court did not err by declining to give an instruction for lost earning capacity when the Plaintiff's discovery responses did not set out a claim for loss of earning capacity and when there was no evidence supporting a claim for loss of earning capacity.

The trial court properly declined to give an instruction for loss of earning capacity in this matter because Plaintiff had failed in all stages of the litigation to set out a claim for loss of earning capacity. Rather, the evidence before the court is that Plaintiff continued in her rigorous education and employment pursuits throughout the relevant time period. It is proper for the

court to decline to give a proposed jury instruction when that instruction is not supported by substantial evidence.¹⁰⁶ Substantial evidence is considered to be evidence “sufficient to persuade a fair-minded person that the premise is true.”¹⁰⁷

Interrogatory 19 in Defendant’s Interrogatories requested that if Plaintiff was claiming a loss of wages, earnings, or profits as a result of the incident, she must provide a detailed account of the amount claimed and the factual basis for the amount claimed.¹⁰⁸ The interrogatory further requested specific periods of time missed and the relevant employers’ information.¹⁰⁹ In response, Plaintiff asserted that she was “in the process of obtaining her payroll records and will supplement her wage loss calculations.”¹¹⁰ Under interrogatory 20, Defendants requested that

If you claim impairment of past or future earning capacity as a result of this incident, state the amount of anticipated loss, describing in detail how it is determined and the nature and extent of impairment.¹¹¹

In response, Plaintiff referred the reader to the answer provided to interrogatory 19.¹¹² No further response was given in supplementation to these responses.¹¹³ Although Plaintiff failed to provide her signature to the

¹⁰⁶ *Minert v. Harsco Corp.* 26 Wn.App. 867, 873, 614 P.2d 686 (1990).

¹⁰⁷ *Id.* at 577.

¹⁰⁸ RP 4509.

¹⁰⁹ RP 4509-4510.

¹¹⁰ RP 4510.

¹¹¹ RP 4510.

¹¹² RP 4510.

¹¹³ RP 4510.

discovery responses sent out in this matter, counsel for Plaintiff signed and attested to their validity.¹¹⁴

Plaintiff argues that significant evidence was provided during trial to support that Plaintiff's ability to earn a living had been impacted. This assertion is incorrect. To the contrary, much evidence was offered to support that Plaintiff was able to continue successfully in her rigorous schedule. For example, Plaintiff was able to graduate on time while participating in the running start program at Tacoma Community College ("TCC").¹¹⁵ She was able to acquire a two year degree at TCC, as well as a second two year degree at Seattle Central College.¹¹⁶ She worked with various employers in numerous fields, working at Albertson's, Spiro's, Loki Fish, Serafina,¹¹⁷ and as a soccer coach during the relevant periods.¹¹⁸ While attending culinary school in Seattle, she commuted from Gig Harbor via bus, often leaving between 4:30 am to 5:00 am in order to make her 7:00 am class¹¹⁹ and returning home around 6:30 pm.¹²⁰ Even while pregnant, Plaintiff began attending an epidemiology program at Pacific Lutheran University or ("PLU").¹²¹

Most importantly, Plaintiff has failed to show that any of her treating providers had determined that she was unable to work as a result of her

¹¹⁴ RP 3595.

¹¹⁵ RP 3369-3370.

¹¹⁶ RP 3372.

¹¹⁷ RP 3374.

¹¹⁸ RP 3367.

¹¹⁹ RP 3344.

¹²⁰ RP3573.

¹²¹ RP 3576.

alleged injuries. During Plaintiff's testimony, the jury asked Plaintiff "Have any of your doctors told you that you cannot work or that you cannot do physical activities?"¹²² The Plaintiff responded "No," that they had not told her that she could not work or do physical activities.¹²³

In no way has Plaintiff shown that her injuries "ha[d] diminished the ability of the plaintiff to earn money."¹²⁴ This is particularly true as to the Prather/Knauer accident as Plaintiff was a teenage high school student at that time. Rather, the evidence shows that she had been gainfully employed and/or attending school during much of the time period considered. Plaintiff failed to set out a claim for, or evidence of, lost earning capacity, both in pre-trial proceedings and throughout the trial. The court did not err in declining to give an instruction for lost earning capacity.

G. The Judgment as to Prather and Knauer should be affirmed because there is no basis for a new trial based on allegations of jury misconduct.

The Plaintiff is tasked with a high burden in efforts to overturn a verdict for jury misconduct. In *Chiappetta v. Bahr*, the Court of Appeals held that an "appellant must make a strong, affirmative showing of misconduct in order to overcome the policy favoring stable verdicts and the secret and frank discussion of evidence by the jury."¹²⁵ Juror affidavits, which were utilized

¹²² CP 2081; RP 3708.

¹²³ RP 3708.

¹²⁴ *Bartlett v. Hantover*, 9 Wn.App. 614, 619-20, 513 P.2d 844 (1973).

¹²⁵ *Chiappetta v. Bahr*, 111 Wn.App. 536, 540, 46 P.3d 797 (2002).

by Plaintiff here, “may not be used to contest the thought processes involved in reaching a verdict.”¹²⁶ In fact, courts have long recognized that they generally do not inquire into the internal process by which the jury reaches its verdict.¹²⁷ As set forth by the Washington Supreme Court in *Cox v. Charles Wright Acad. Inc.*, “The individual or collective thought processes leading to a verdict inhere in the verdict and cannot be used to impeach a jury verdict.”¹²⁸

The mental processes by which individual jurors reach their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors’ intentions and beliefs, are all factors inhering in the jury’s processes in arriving at its verdict, and therefore, inhere in the verdict itself, and averments concerning them are inadmissible to impeach the verdict.¹²⁹

It is deemed an abuse of discretion for the court to admit and consider a juror’s declaration that contains discussions of juror deliberations and matters that inhere in the verdict.¹³⁰ Neither the Coalman nor the Wiebe declarations should be considered because they each concern information that inhaled in the jury’s verdict. Both declarations discussed the alleged mental processes of the jury and, thus, should be wholly disregarded. In the presence of counsel and the trial judge, both Coalman and Wiebe represented that they

¹²⁶ *Id.* at 541 (emphasis added).

¹²⁷ *Gardner v. Malone*, 60 Wn.2d 836, 840, 376 P.2d 651 (1962).

¹²⁸ *Breckenridge v. Valley General Hospital*, 150 Wn.2d 197 at 204-05, 75 P.3d 944 (2000).

¹²⁹ *Cox v. Charles Wright Acad., Inc.*, 70 Wn.2d 173, 179-80, 422 P.2d 515 (1967).

¹³⁰ *McCoy v. Kent Nursery*, 163 Wn. App. 744, 758, 260 P.3d 967 (2011).

agreed with the verdict after it was read in open court, supporting that at least ten members of the jury contributed to the verdict.¹³¹ In fact, on February 22, 2018, Coalman even supplied her signature to the completed verdict form.¹³²

Further, even if those speculative declarations are considered, Plaintiff has failed to make a “strong affirmative showing of misconduct.” The declarations relied upon by the Plaintiff offer no substantiation or even clarity in support of the alleged claims of misconduct. Instead, the declarations provide references to unnamed jurors and non-specific activity that the unnamed jurors supposedly participated in. For example, Coalman states “it became apparent that notwithstanding the Court’s orders, a good number of jurors – approximately four to five as I recall – had nevertheless got on the Internet and were reviewing Rebecca Hart’s Facebook page.”¹³³ Similarly, Wiebe states “I recall during deliberations that some of the jurors had looked up Rebecca Hart’s Facebook page on the internet.”¹³⁴ Neither of these declarations offer any specifics regarding the particular jurors alleged to have looked up Plaintiff’s Facebook page, nor do they advise that they even saw any juror look up Plaintiff’s Facebook page. For example, there is no declaration introducing evidence that a juror brought up the Facebook page on a cell phone and showed it to other jurors. The statements made do not identify the number of jurors alleged to have participated in this activity, the

¹³¹ RP 4437-4438.

¹³² CP 2562.

¹³³ Appellant’s Opening Brief – Appendices, pg. 021.

¹³⁴ *Id.* at 026.

identities of these jurors or, most importantly, what, if anything, was allegedly reviewed or seen on the Facebook page and whether what they allegedly viewed was any different than the Facebook evidence introduced in trial. It is equally possible that the alleged jurors were referencing the Facebook evidence that was admitted into evidence during the trial.

Similarly, there is no merit as to the contentions made by Coalman and Wiebe regarding an unidentified juror's alleged comments about their alleged life experiences in living on the route of the Stanton/Nelson pursuit route. Both Coalman and Wiebe suggest there was misconduct based on an unidentified juror's alleged knowledge of the collision location.¹³⁵ Further, even if made, such comments would not be misconduct. Rather, knowledge of a specific street location falls under the category of personal life experiences which jurors are allowed to rely upon during the deliberation process. In addition, it should be noted that as to the judgment against Prather and Knauer, any special jury knowledge of the Stanton/Nelson accident location would be irrelevant and would not justify setting aside the judgment as to Prather and Knauer.

Plaintiff ineffectively cites to case law involving jury visits to accident scenes. Neither Coalman nor Wiebe allege that any of the jurors visited the scene of the accident. In fact, neither supplies information supporting that novel or extrinsic evidence was considered during deliberations. Rather, the alleged information, if true, appears to be

¹³⁵ *Id.* at 026, 022.

information obtained via evidence or upon personal life experiences.¹³⁶ “Jurors are expected to utilize their common sense and the normal avenues of deductive reasoning to determine the truth of the facts presented.”¹³⁷ The knowledge alleged does not appear to be any more informative than what was already admitted into evidence by way of the accident scene diagram.

Both Coalman and Wiebe’s declarations rely on hearsay allegations allegedly made by unidentified jurors.¹³⁸ These comments are inadmissible and should not be considered for that reason.¹³⁹

Finally, Plaintiff has not shown she was prejudiced as a result of this alleged jury activity. Even though Coalman and Wiebe suggest that “jurors had already made up their mind against the plaintiff before even hearing any evidence in the case”¹⁴⁰ and that “it became very apparent that there was a good number of jurors who simply liked Emily Prather, and did not want to rule against her,”¹⁴¹ this same jury agreed to award substantial damages to Plaintiff and to find Prather at fault for the accident and award damages against her. The “bias” speculated to by Coalman and Wiebe is wholly inconsistent with the actual award made by the jury. Additionally, there was strong evidence presented during trial that indicated Prather was not at fault. In particular, there was testimony that Prather had a green arrow when

¹³⁶ *State v. Balisok*, 123 Wn.2d 114, 119, 886 P.2d 631 (1994) (the Supreme Court reversed the finding of the Court of Appeals and held that there was no jury misconduct when jurors performed reenactments of the alleged crime.)

¹³⁷ *Id.*

¹³⁸ ER 801.

¹³⁹ ER 802.

¹⁴⁰ *Id.* at 019.

¹⁴¹ *Id.* at 020.

making her left hand turn such that she, and not Plaintiff, had the right of way.¹⁴² If the jurors had already made up their minds against the Plaintiff, or if jurors did like Prather and did not want to rule against her, those jurors would have simply found that Prather was not at fault. The fact that they did not belies the speculation of bias set out in the declarations of Coalman and Wiebe.

As Plaintiff has failed to make a strong affirmative showing of misconduct or that she was in anyway prejudiced by the alleged misconduct, she has not met her burden to overcome the policy favoring stable verdicts and confidential jury deliberations. There should be no new trial based on alleged jury misconduct, and the judgment as to Prather and Knauer should be affirmed.

V. CONCLUSION

The judgment as to Prather and Knauer should be affirmed. Nothing in Plaintiff's brief provides a reason for this Court to order a retrial which would be a significant waste of judicial resources after a six-week trial where the parties were able to present their evidence and make their arguments and where the jurors worked to provide a verdict.

The trial court provided jury instructions and a verdict form that were in harmony with Washington law that successive tortfeasors are only jointly and severally liable when there has been indivisible injury. Despite a very

¹⁴² RP 3915; 3916; 3984.

favorable question on the verdict form that would have led to joint and several liability if the jury had found that even “some” of Plaintiff’s damages were indivisible, the jury specifically found that none of the Plaintiff’s injuries were indivisible, and the verdict form then allowed for apportionment of those divisible injuries between the accidents. The Trial Court then correctly entered a judgement against Prather and Knauer for their several liability based on the jury’s allocation. Nothing in Plaintiff’s brief provides a reason to set aside the judgment as to Prather and Knauer.

RESPECTFULLY SUBMITTED this 7th day of June, 2019.

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